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FILED

JULY 31, 2009

**NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS**

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS

IN THE MATTER OF THE SUSPENSION	:	
OR REVOCATION OF THE LICENSE OF	:	Administrative Action
	:	
JOHN MANZELLA, M.D.	:	FINAL DECISION AND ORDER
License No. MA02240100	:	
	:	
TO PRACTICE MEDICINE AND SURGERY	:	
IN THE STATE OF NEW JERSEY	:	

This matter commenced with the filing of a Complaint by the Attorney General of New Jersey against the respondent, John R. Manzella, M.D. on March 3, 2008. The Complaint alleged in Count I that respondent engaged in sexual misconduct in connection with the care and treatment of patient M.W. in violation of N.J.S.A. 45:1-21(e), (f) and (h) constituting professional misconduct, acts of moral turpitude, and failure to comply with a Board regulation. Respondent's acts are also alleged to violate N.J.A.C. 13:35-6.3 the Board's sexual misconduct regulation, and to constitute conduct evidencing a lack of good moral character in violation of N.J.S.A. 45:9-6. Within Count II the Attorney General alleges that respondent practiced with an expired license in violation of

CERTIFIED TRUE COPY

N.J.S.A. 45:9-6, 45:1-21(e) and (h). Count III contains an assertion that respondent failed to maintain medical records in violation of N.J.A.C. 13:35-6.5, N.J.A.C. 13:35-7.6 and N.J.S.A. 45:1-21(h). The State alleges in Count V* that respondent breached his duty to cooperate with the investigation in violation of N.J.A.C. 13:45C-1.2, N.J.S.A. 45:1-21 (e) and (h). Finally Count VI concerns an allegation that respondent failed to maintain mandatory malpractice insurance in violation of N.J.A.C. 13:35-6.18(b) and N.J.S.A. 45:9-19.17.

Respondent filed an Answer denying the allegations on March 13, 2008. The matter was referred to the Office of Administrative Law on March 26, 2008. On June 17, 2008, the Attorney General filed a Motion for Summary Decision as to Counts III, V and VI. On June 25, 2008 respondent filed a response to the Summary Decision Motion and the Attorney General's reply was filed on July 8, 2008. By Order dated July 11, 2008, Administrative Law Judge (ALJ) Douglas H. Hurd granted the Attorney General's Motion for Summary Decision as to Counts III, V and VI. The Attorney General's motion did not seek summary decision as to Counts I and II of the Complaint and a hearing on those remaining Counts was conducted on October 24, 2008.

The Order Granting Partial Summary Decision concludes:

* There is no fourth count in the Complaint.

The summary decision standard set forth above has been overwhelmingly satisfied by the Attorney General in this matter. The Attorney General's motion sets forth specific facts supported by documentation as to each of the three Counts. The respondent failed to set forth "specific facts" as to these counts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). Accordingly, the documents filed show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to an Order as a matter of law for Counts III, V and VI. It is so Ordered.

The Board of Medical Examiners pursuant to N.J.A.C. 1:1-18.6 reviewed ALJ Hurd's determination granting partial summary decision at the end of the contested case and adopted the findings of fact and conclusions of law included within the Initial Decision in toto as part of its Final Decision. Respondent did not file exceptions concerning the finding of fact or conclusions of law regarding Counts III, V and VI.

A November 7, 2008 Initial Decision finding respondent to be liable on all remaining counts of the Complaint was to be considered by the Board of Medical Examiners for final disposition on January 14, 2008. However, at the request of respondent's attorney, the deadline for the Board to render a decision was twice extended, and the matter was adjourned on two occasions based on respondent's representation that due to a medical condition he could not appear and that he would refrain from practice. The matter was ultimately heard on June 10, 2009. Respondent filed

exceptions to the Initial Decision on November 20, 2008 and the Attorney General submitted a reply dated December 4, 2008 both of which were considered by the Board.

At the hearing before the Board, Scott A. Telson, Esq. appeared on behalf of respondent. William Lim, DAG represented the complainant. The thrust of respondent's objections are that the ALJ's credibility findings are in error and the costs and penalties are too high. He specifically objected to the credibility finding of the ALJ as to patient M.W. and asserts she was confused and had a poor memory. He also took exception to the finding that respondent was not credible and that the hearsay statement of a witness who did not appear was relied upon by the ALJ. Additionally, respondent took exception to the assessment of attorney fees and costs and asked the Board to use its discretion to reduce the monetary penalties.

The Attorney General argued in his response that pursuant to N.J.A.C. 1:1-18.6(c) in order to alter the ALJ's findings on witness credibility the Board would need to find they were "arbitrary, capricious or unreasonable," that the judge's credibility assessment was reasonable and should be affirmed. In regard to the ALJ's reliance on an out of court statement of a neighbor of M.W. the DAG argued that N.J.A.C. 1:1-15.5 allows consideration of hearsay when a residuum of other competent, non-hearsay evidence exists as in the present matter.

We agree, and find that pursuant to N.J.A.C. 1:1-18.6 the agency may "not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of a record that the findings are arbitrary, capricious or unreasonable" We find after a review of the record that the ALJ's credibility findings are rational and supported by the record and explained in the well-reasoned Initial Decision. Furthermore, the ALJ is trained in assessing credibility and in the best position to consider the totality of the information available including motive, bias, corroborative evidence and demeanor, in making credibility determinations. In support of his finding that M.W. was more credible than respondent the ALJ stated

M.W.'s testimony was powerful, open, forthright and consistent. The pain caused by respondent's conduct was visible on M.W.'s face and in her demeanor. Her testimony was corroborated by P-8, the statement given by her neighbor. Respondent's testimony, on the other hand, seemed contrived and lacked candor. In conclusion M.W.'s testimony had the ring of truth.

We further reject respondent's exception as to the out-of-court statement of a witness and rely on the "Residuum Rule" N.J.A.C. 1:1-15.5 to find the ALJ properly considered that evidence.

We also reject respondent's exceptions as to the costs and penalties as he makes only a generalized assertion that the costs are extremely high and unconscionable. Although there is no

individualized assessment as required by N.J.A.C. 1:1-18.4(b) which requires respondent to set forth "supporting reasons" for objecting to any of the specific time entries and or invoices. Nevertheless we have found the costs sought to be reasonable and note the judge discounted the fees the State sought by \$11,170.96 from \$72,021.82 to \$60,850.86.

We also did a careful review of the exhibits submitted with the Attorney General's certification detailing all costs sought. Within said exhibits the Attorney General documented the following costs incurred in the course of the proceedings regarding Dr. Manzella.

Attorney's fees:	\$45,874.50
Investigative costs:	13,073.66
Court Reporting Costs:	<u>1,902.70</u>
Total	\$72,021.82

The Attorney General's certification is supported by time sheets of DAsG Fredericks* and Lim, and a memorandum by Nancy Kaplan, then Acting Director of the Department of Law and Public Safety detailing the uniform rate of compensation for the purpose of recovery of attorneys fees (see State v. Waldron, Docket No. L702-99 (Law Div. December 4, 2001) established in 1999 and amended in 2005. The memorandum sets the hourly rate of a DAG with less than five (5) years of legal experience such as DAsG Lim and Fredericks, at \$135.00 per hour as of 2005.

* Former DAG Diana Fredericks performed pre-complaint legal work and drafted the Complaint.

We find the application to be sufficiently detailed to support the affirmance of the ALJ award of costs with one amendment - the addition of \$3,280.50 occasioned by supplemental legal work performed from the time of the Initial Decision until the end of April 2009 as a direct result of respondent's several requests for adjournment.

In our view the amount of time spent, and the overall fees sought are objectively reasonable. We also believe the hourly rate for the Deputies is below that charged for legal services in the community and this rate has been sustained in prior cases. See (Poritz v. Stang, 288 N.J. Super 217 (App. Div. 1996) and the rules of Professional Conduct). We find in regard to all charges the ALJ imposed that the Attorney General has adequately documented the legal and investigatory work which was performed and find that the work documented was work necessary to advance the prosecution of this case. We reject respondent's amorphous assertions that the hours spent were unnecessary. We further note that despite being advised, respondent did not submit any certified financial statements documenting inability to pay. We are thus satisfied that the Attorney General has adequately documented the tasks performed to support the application for attorney's fees and costs and that the claims are reasonable especially when viewed in the context of the seriousness and scope of the action maintained against Dr. Manzella. Furthermore, the costs are justified in this

case involving the protection of the public safety and welfare as the conduct includes violations of the Board's sexual misconduct regulations and other laws governing medical practice in this State.

Based upon the entirety of the record in this case and the arguments of counsel, the Board adopts the findings of fact and conclusions of law of the ALJ Hurd. Thus, the Board finds that respondent sexually assaulted M.W. by inappropriately touching her breasts and buttocks on multiple occasions, and asking her if he could have sex with her in the context of the provision of injections that would make her incoherent. We therefore find:

1. Professional misconduct, in violation of N.J.S.A. 45:1-21 (e);
2. Sexual misconduct, in violation of N.J.A.C. 13:35-6.3;
3. Acts constituting a crime or offense involving moral turpitude, in violation of N.J.S.A. 45:1-21(f);
4. Repeated failures to comply with the provisions of an act or regulation administered by the Board, in violation of N.J.S.A. 45:1-21(h); and
5. A demonstration of lack of good moral character which is a requisite to maintaining a license to

practice medicine in the State of New Jersey, as required by N.J.S.A. 45:9-6.

We also find that respondent practiced medicine from August 4 through September 20, 2005 while unlicensed as his license was suspended by operation of law due to his failure to timely renew it. Said unlicensed practice constitutes the following:

1. The unlicensed practice of medicine, in violation of N.J.S.A. 45:9-6;
2. Professional misconduct, in violation of N.J.S.A. 45:1-21(e); and
3. Repeated violations of the statutes administered by the Board, in violation of N.J.S.A. 45:1-21(h).

Finally, we also adopt in toto the findings of fact and conclusions of law in ALJ Hurd's Partial Summary Decision Order.

THEREFORE, it is on this 31st day of July, 2009

ORDERED:

1. Effective upon the oral announcement of this Order on the record on June 10, 2009 the license of John R. Manzella, M.D., to practice medicine and surgery in the State of New Jersey is hereby revoked. Respondent shall immediately cease and desist any practice of medicine in the State of New Jersey.

2. Respondent shall pay a monetary penalty of \$30,000. Such penalty shall be paid within thirty (30) days of the date of this Order by certified check or money order payable to the

Treasurer, State of New Jersey and delivered to Mr. William Roeder, 140 E. Front Street, P.O. Box 183, Trenton, New Jersey 08625.

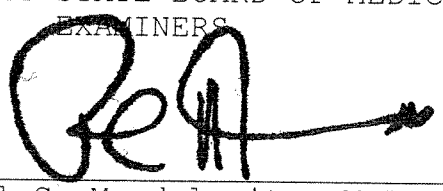
3. Respondent shall pay costs to the State for the prosecution of this matter. Such costs shall be paid within ten (10) days of the date of this Order by certified check or money order in the total amount of \$64,131.36 payable to the Treasurer of the State of New Jersey and delivered to Mr. William Roeder, Executive Director, 140 E. Front Street, P.O. Box 183, Trenton, New Jersey 08625.

4. In the event respondent does not timely submit payment of the civil penalties or costs, a certificate of debt shall be filed, and such other proceedings as are permitted by law may be instituted.

5. Respondent shall comply with all parts of the Board's directives applicable to disciplined licensees, attached hereto and made a part hereof.

NEW JERSEY STATE BOARD OF MEDICAL
EXAMINERS

By: _____


Paul C. Mendelowitz, M.D.
President

John R. Manzella, M.D.
NJ License #MA02240100

ADDENDUM

Any licensee who is the subject of an order of the Board suspending, revoking or otherwise conditioning the license, shall provide the following information at the time that the order is signed, if it is entered by consent, or immediately after service of a fully executed order entered after a hearing. The information required here is necessary for the Board to fulfill its reporting obligations:

Social Security Number¹: _____

List the Name and Address of any and all Health Care Facilities with which you are affiliated:

List the Names and Address of any and all Health Maintenance Organizations with which you are affiliated:

Provide the names and addresses of every person with whom you are associated in your professional practice: (You may attach a blank sheet of stationery bearing this information).

¹ Pursuant to 45 CFR Subtitle A Section 61.7 and 45 CFR Subtitle A Section 60.8, the Board is required to obtain your Social Security Number and/or federal taxpayer identification number in order to discharge its responsibility to report adverse actions to the National Practitioner Data Bank and the HIP Data Bank.

**DIRECTIVES APPLICABLE TO ANY MEDICAL BOARD LICENSEE
WHO IS DISCIPLINED OR WHOSE SURRENDER OF LICENSURE
HAS BEEN ACCEPTED**

APPROVED BY THE BOARD ON MAY 10, 2000

All licensees who are the subject of a disciplinary order of the Board are required to provide the information required on the addendum to these directives. The information provided will be maintained separately and will not be part of the public document filed with the Board. Failure to provide the information required may result in further disciplinary action for failing to cooperate with the Board, as required by N.J.A.C. 13:45C-1 et seq. Paragraphs 1 through 4 below shall apply when a license is suspended or revoked or permanently surrendered, with or without prejudice. Paragraph 5 applies to licensees who are the subject of an order which, while permitting continued practice, contains a probation or monitoring requirement.

1. Document Return and Agency Notification

The licensee shall promptly forward to the Board office at Post Office Box 183, 140 East Front Street, 2nd floor, Trenton, New Jersey 08625-0183, the original license, current biennial registration and, if applicable, the original CDS registration. In addition, if the licensee holds a Drug Enforcement Agency (DEA) registration, he or she shall promptly advise the DEA of the licensure action. (With respect to suspensions of a finite term, at the conclusion of the term, the licensee may contact the Board office for the return of the documents previously surrendered to the Board. In addition, at the conclusion of the term, the licensee should contact the DEA to advise of the resumption of practice and to ascertain the impact of that change upon his/her DEA registration.)

2. Practice Cessation

The licensee shall cease and desist from engaging in the practice of medicine in this State. This prohibition not only bars a licensee from rendering professional services, but also from providing an opinion as to professional practice or its application, or representing him/herself as being eligible to practice. (Although the licensee need not affirmatively advise patients or others of the revocation, suspension or surrender, the licensee must truthfully disclose his/her licensure status in response to inquiry.) The disciplined licensee is also prohibited from occupying, sharing or using office space in which another licensee provides health care services. The disciplined licensee may contract for, accept payment from another licensee for or rent at fair market value office premises and/or equipment. In no case may the disciplined licensee authorize, allow or condone the use of his/her provider number by any health care practice or any other licensee or health care provider. (In situations where the licensee has been suspended for less than one year, the licensee may accept payment from another professional who is using his/her office during the period that the licensee is suspended, for the payment of salaries for office staff employed at the time of the Board action.)

A licensee whose license has been revoked, suspended for one (1) year or more or permanently surrendered must remove signs and take affirmative action to stop advertisements by which his/her eligibility to practice is represented. The licensee must also take steps to remove his/her name from professional listings, telephone directories, professional stationery, or billings. If the licensee's name is utilized in a group practice title, it shall be deleted. Prescription pads bearing the licensee's name shall be destroyed. A destruction report form obtained from the Office of Drug Control (973-504-6558) must be filed. If no other licensee is providing services at the location, all medications must be removed and returned to the manufacturer, if possible, destroyed or safeguarded. (In situations where a license has been suspended for less than one year, prescription pads and medications need not be destroyed but must be secured in a locked place for safekeeping.)

3. Practice Income Prohibitions/Divestiture of Equity Interest in Professional Service Corporations and Limited Liability Companies

A licensee shall not charge, receive or share in any fee for professional services rendered by him/herself or others while barred from engaging in the professional practice. The licensee may be compensated for the reasonable value of services lawfully rendered and disbursements incurred on a patient's behalf prior to the effective date of the Board action.

A licensee who is a shareholder in a professional service corporation organized to engage in the professional practice, whose license is revoked, surrendered or suspended for a term of one (1) year or more shall be deemed to be disqualified from the practice within the meaning of the Professional Service Corporation Act. (N.J.S.A. 14A:17-11). A disqualified licensee shall divest him/herself of all financial interest in the professional service corporation pursuant to N.J.S.A. 14A:17-13(c). A licensee who is a member of a limited liability company organized pursuant to N.J.S.A. 42:1-44, shall divest him/herself of all financial interest. Such divestiture shall occur within 90 days following the the entry of the Order rendering the licensee disqualified to participate in the applicable form of ownership. Upon divestiture, a licensee shall forward to the Board a copy of documentation forwarded to the Secretary of State, Commercial Reporting Division, demonstrating that the interest has been terminated. If the licensee is the sole shareholder in a professional service corporation, the corporation must be dissolved within 90 days of the licensee's disqualification.

4. Medical Records

If, as a result of the Board's action, a practice is closed or transferred to another location, the licensee shall ensure that during the three (3) month period following the effective date of the disciplinary order, a message will be delivered to patients calling the former office premises, advising where records may be obtained. The message should inform patients of the names and telephone numbers of the licensee (or his/her attorney) assuming custody of the records. The same information shall also be disseminated by means of a notice to be published at least once per month for three (3) months in a newspaper of

general circulation in the geographic vicinity in which the practice was conducted. At the end of the three month period, the licensee shall file with the Board the name and telephone number of the contact person who will have access to medical records of former patients. Any change in that individual or his/her telephone number shall be promptly reported to the Board. When a patient or his/her representative requests a copy of his/her medical record or asks that record be forwarded to another health care provider, the licensee shall promptly provide the record without charge to the patient.

5. Probation/Monitoring Conditions

With respect to any licensee who is the subject of any Order imposing a probation or monitoring requirement or a stay of an active suspension, in whole or in part, which is conditioned upon compliance with a probation or monitoring requirement, the licensee shall fully cooperate with the Board and its designated representatives, including the Enforcement Bureau of the Division of Consumer Affairs, in ongoing monitoring of the licensee's status and practice. Such monitoring shall be at the expense of the disciplined practitioner.

(a) Monitoring of practice conditions may include, but is not limited to, inspection of the professional premises and equipment, and inspection and copying of patient records (confidentiality of patient identity shall be protected by the Board) to verify compliance with the Board Order and accepted standards of practice.

(b) Monitoring of status conditions for an impaired practitioner may include, but is not limited to, practitioner cooperation in providing releases permitting unrestricted access to records and other information to the extent permitted by law from any treatment facility, other treating practitioner, support group or other individual/facility involved in the education, treatment, monitoring or oversight of the practitioner, or maintained by a rehabilitation program for impaired practitioners. If bodily substance monitoring has been ordered, the practitioner shall fully cooperate by responding to a demand for breath, blood, urine or other sample in a timely manner and providing the designated sample.

**NOTICE OF REPORTING PRACTICES OF BOARD
REGARDING DISCIPLINARY ACTIONS**

Pursuant to N.J.S.A. 52:14B-3(3), all orders of the New Jersey State Board of Medical Examiners are available for public inspection. Should any inquiry be made concerning the status of a licensee, the inquirer will be informed of the existence of the order and a copy will be provided if requested. All evidentiary hearings, proceedings on motions or other applications which are conducted as public hearings and the record, including the transcript and documents marked in evidence, are available for public inspection, upon request.

Pursuant to 45 CFR Subtitle A 60.8, the Board is obligated to report to the National Practitioners Data Bank any action relating to a physician which is based on reasons relating to professional competence or professional conduct:

- (1) Which revokes or suspends (or otherwise restricts) a license,
- (2) Which censures, reprimands or places on probation,
- (3) Under which a license is surrendered.

Pursuant to 45 CFR Section 61.7, the Board is obligated to report to the Healthcare Integrity and Protection (HIP) Data Bank, any formal or official actions, such as revocation or suspension of a license (and the length of any such suspension), reprimand, censure or probation or any other loss of license or the right to apply for, or renew, a license of the provider, supplier, or practitioner, whether by operation of law, voluntary surrender, non-renewability, or otherwise, or any other negative action or finding by such Federal or State agency that is publicly available information.

Pursuant to N.J.S.A. 45:9-19.13, if the Board refuses to issue, suspends, revokes or otherwise places conditions on a license or permit, it is obligated to notify each licensed health care facility and health maintenance organization with which a licensee is affiliated and every other board licensee in this state with whom he or she is directly associated in private medical practice.

In accordance with an agreement with the Federation of State Medical Boards of the United States, a list of all disciplinary orders are provided to that organization on a monthly basis.

Within the month following entry of an order, a summary of the order will appear on the public agenda for the next monthly Board meeting and is forwarded to those members of the public requesting a copy. In addition, the same summary will appear in the minutes of that Board meeting, which are also made available to those requesting a copy.

Within the month following entry of an order, a summary of the order will appear in a Monthly Disciplinary Action Listing which is made available to those members of the public requesting a copy.

On a periodic basis the Board disseminates to its licensees a newsletter which includes a brief description of all of the orders entered by the Board.

From time to time, the Press Office of the Division of Consumer Affairs may issue releases including the summaries of the content of public orders.

Nothing herein is intended in any way to limit the Board, the Division or the Attorney General from disclosing any public document.